Supreme Court, U. S.
FILED
MAY 27 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1729

LODGES 1746 AND 743, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
Petitioners,

v.

UNITED AIRCRAFT CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PLATO E. PAPPS
Machinists Building
Washington, D. C. 20036

MOZART G. RATNER
1900 M Street, N. W.
Washington, D. C. 20036
Attorneys for Petitioners

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D. C. 20037
Of Counsel:

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
A. The Company Agrees to Recall Strikers to Available Jobs and Jobs Which Develop by the End of the Year	4
B. The Company Represents That the Complements Will Be Restored to Pre-Strike Size by Around Labor Day	5
C. The Company Fails to Recall Strikers Who Were Not Replaced or for Whom Vacancies Were Apparently Created by Termination	7
D. The "Hiring Surge" After January 1, 1961	9
E. The Belated Parts Shortage Explanation	10
1. Underpopulation of the Machine Shop	13
2. The Pattern of Employment Generally	14
3. Depression at Broad Brook	15
4. Planned Reduction in Maintenance Operation	15
5. Planned Substitution of Overtime for Unrecalled Strikers	15
6. The Company's Foreknowledge of Complement Depression and Its Consequences for Reinstatement	16
7. The Company's Concealment and Misinterpretations	17

Page

F. The Company Discriminatorily Prefers All Other Employees Over Senior Unrecalled Registered Strikers for Available Jobs 18

G. The Company Denies Registered Strikers Access to Many Available Jobs They Are Qualified To Fill 20

REASONS FOR GRANTING THE WRIT 21

I. THIS CASE INVOLVES IMPORTANT QUESTIONS CONCERNING THE INTERPRETATION OF STRIKE SETTLEMENT AGREEMENTS IN LIGHT OF NATIONAL LABOR POLICY 21

II. THE LOWER COURT'S ALLOCATION OF THE BURDEN OF PROOF IS CONTRARY TO THE HOLDING OF FLEETWOOD AND THE REQUIREMENTS OF NATIONAL LABOR POLICY 32

III. DENIAL TO UNRECALLED STRIKERS OF OPPORTUNITY TO COMPETE FOR OPEN JOBS ON THE BASIS OF SENIORITY LICENSES DISCRIMINATION 35

IV. DENIAL OF RECALL OPPORTUNITIES TO MANY JOBS STRIKERS ARE QUALIFIED TO FILL CONFLICTS WITH LONG ESTABLISHED LAW APPROVED IN FLEETWOOD.. 42

CONCLUSION 44

APPENDIX A—Statute Involved 1a

APPENDIX B—Monthly Population of the Pratt & Whitney Machine Shop 2a

APPENDIX C—Complement Depression and Reflation .. 2a

AUTHORITIES CITED

Page

CASES:

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 23, 31
Allied Industrial Workers., AFL-CIO, Local Union No. 289 v. NLRB, 476 F.2d 868 (D.C.Cir. 1973) .. 39
Berg v. Erickson, 234 Fed. 817 (8 Cir. 1916) 24
Continental Co. v. Union Carbide, 370 U.S. 690 (1962) 35
Dick v. New York Life Ins. Co., 359 U.S. 437 (1959) .. 33
Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) 31
Eastern Air Lines, Inc. v. McDonnell Douglas Corp., slip op. 3448 (5 Cir., May 17, 1976) 25
Fire Alert Company, 207 NLRB 885 (1973) 43
Franks v. Bowman Transportation Co., 96 S.Ct. 1251 (1976) 35
Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1974) 22
General Electric Co., 80 NLRB 510 (1948) 35, 36
Great Lakes Carbon Co. v. NLRB, 360 F.2d 19 (4 Cir. 1966) 36, 39
Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974) 37
International Ass'n of M. & A. W. Dist. No. 8 v. J. L. Clark Co., 471 F.2d 694 (7 Cir. 1972) 39, 41
Hines v. Anchor Motor Freight, Inc., 96 S.Ct. 1048 (1976) 30
J. I. Case Co. v. NLRB, 321 U.S. 332 (1944) 39
Labor Board v. Erie Resistor Corp., 373 U.S. 221 (1963) 12, 19, 22, 29, 31, 32, 36, 38, 39, 40, 41
Laidlaw Corporation, 171 NLRB 1366 (1968), enforced 414 F.2d 99 (7 Cir. 1969), cert. denied, 397 U.S. 920 (1970) 37
Lavine v. Milne, 96 S.Ct. 1010 (1976) 33, 34
NLRB v. Acme Industrial Co., 385 U.S. 432 (1967) .. 25
NLRB v. Great Dane Trailers, 388 U.S. 26 (1967) .. 29
NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967) 3, 12, 21, 23, 29, 31, 32, 33, 35, 42, 43, 44
NLRB v. Frick Company, 397 F.2d 956 (3 Cir. 1968) .. 36
NLRB v. Industrial Cotton Mills, 208 F.2d 87 (4 Cir. 1953), cert. denied, 347 U.S. 935 .....32, 35

Page

NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938) 19, 37, 39, 40
NLRB v. Potlatch Forests, 189 F.2d 82 (9 Cir. 1951) .. 38
NLRB v. Strong, 393 U.S. 357 (1969) 23, 31
NLRB v. Transport Company of Texas, 438 F.2d 258 (5 Cir. 1971) 39
Olin Mathieson Chem. Corp. v. NLRB, 232 F.2d 158 (4 Cir., 1956), aff'd. per curiam, 352 U.S. 1020 (1957) 36, 38, 40, 41
Palmer v. Hoffman, 318 U.S. 109 (1943) 33
Perry v. Sinderman, 408 U.S. 503 (1972) 23
Quality Castings Co., 139 NLRB 928 (1962) 35
Quality Castings Co. v. NLRB, 325 F.2d 36 (6 Cir. 1963) 35, 41
Railway Clerks v. Allen, 373 U.S. 113 (1963) 33
Retail Clerks v. Lion Dry Goods, 369 U.S. 17 (1962) 22
Ryder Truck Rental, Inc. v. Central Packing Company, 341 F.2d 321 (10 Cir., 1965), cert. denied 382 U.S. 827 (1965) 23
Smith v. Evening News Ass'n., 371 U.S. 195 (1962) .. 23
South Carolina v. Katzenbach, 383 U.S. 301 (1966) .. 33
Steelworkers Trilogy, 363 U.S. 564 (1960); 363 U.S. 574 (1960); 363 U.S. 593 (1960) 22, 23, 32
Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962) 22, 23
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 2, 21, 32
United States v. New York, N.H. & H.R. Co., 355 U.S. 253 (1957) 33

STATUTES:

Labor Management Relations Act of 1947, 61 Stat. 136 *et seq.*, 29 U.S.C. § 141 *et seq.*:

§ 2(3) 3, 12
§ 7 .....3, 31
§ 8(a)(1) 3, 12
§ 8(a)(3) 3, 12
§ 13 .....3, 31
§ 301 .....3, 21, 22, 26, 32, 34

28 U.S.C. § 1254(1) 2

Page

MISCELLANEOUS:

A.L.I. Restatement of Contracts 28

Corbin, *Contracts* (1960 ed.) 28

H.R. Cong. Rep. No. 510, 80th Cong., 1st Sess. 31

S. Rep. No. 105, 80th Cong., 1st Sess. 21, 30

Webster's Third New International Dictionary (1965) 42

Williston, *Contracts,* Rev. Ed. 1938 .....25, 28

Smit, *Frustration of Contract,* 58 Col. L. Rev. 287 (1958) 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

LODGES 1746 AND 743, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
Petitioners,

v.

UNITED AIRCRAFT CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Lodges 743 and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO, hereafter "the Union" pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit affirming in part and remanding a judgment in favor of United Aircraft Corporation, "the Company" or "the employer," in actions alleging breaches of two Strike Settlement Agreements pertaining to reinstatement of strikers after a 1960 strike.

OPINIONS BELOW

The opinion of the United States Court of Appeals in this case and in a companion NLRB case, No. 75-1686, entered on September 9, 1975, is not yet officially reported but is published at 90 LRRM 2272 and appears in the separate Appendix (1a-82a).[1] The opinion of the district court, 83a-197a, which was entered on March 20, 1969, is reported at 299 F. Supp. 877 (D. Conn., 1969). The final judgment of the district court (198a-205a), was entered on June 27, 1972 and is not officially reported.

JURISDICTION

A timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals for the Second Circuit on December 29, 1975 (206a-207a). By order dated March 19, 1976, Mr. Justice Marshall granted an extension of time for filing this petition until May 27, 1976 (208a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Did the courts below misconceive the teaching of *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456-457 (1957) in failing to apply the assumption of risk principle of the law of contracts, although consistent with and buttressed by national labor policy, and instead excusing non-reinstatement of strikers by limit-

---

[1] To avoid duplication and for convenience the pertinent opinions and orders in both cases are collected and printed in a single appendix, cited " a." References preceding a semicolon are to that appendix. The joint appendix in the court below is designated "J.A." The material contained in the appendix attached to this Petition is designated "App. ——".

ing the contractual obligation on a ground which may constitute a defense to an unfair labor practice charge?

2. Is the burden of proof imposed on the Union inconsistent with *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 379, n. 4 (1967), and national labor policy?

3. Does denial to unrecalled strikers of opportunity to compete in accordance with "status seniority" for unoccupied jobs violate national labor policy?

4. Does restriction of strikers' recall rights to jobs in a single "seniority area" and "occupational group" or jobs in which the striker has "demonstrated" ability, "accord with [the] mandate" of *Fleetwood, supra,* that strikers be recalled to all jobs they are "qualified to fill" and with its imposition on the employer of the burden of proving lack of qualification, where the effect of the restriction is to deprive strikers of many jobs they are qualified to fill?

STATUTE INVOLVED

This case, and the companion case, No. 75-1686, involve Sections 2(3), 7, 8(a)(1), 8(a)(3), 13 and 301 of the Labor Management Relations Act of 1947, 61 Stat. 136 *et seq.*, 29 U.S.C. § 141 *et seq.*, set forth in Appendix A, *infra.*

STATEMENT OF THE CASE

Lodge 743, International Association of Machinists and Aerospace Workers, AFL-CIO, is the exclusive bargaining agent for employees at the Windsor Locks and Broad Brook plants of the Hamilton Standard Division of United Aircraft Corporation; Lodge 1746

represents workers at the East Hartford and Manchester plants of the Pratt & Whitney Aircraft Division of the same Company (3a-4a). On June 8, 1960, the Union began a lawful economic strike for a new contract at the four plants (*id.*).[2] The Union lost the strike, which lasted nine weeks. An oral strike settlement agreement was made, ultimately reduced to writing by the Company (89a-93a) in two similar though not wholly identical documents, one covering the Pratt & Whitney Division, the other the Hamilton Standard Division, both executed August 11, 1960 (4a-5a; 92a).[3]

A. The Company Agrees to Recall Strikers to Available Jobs and Jobs Which Develop by the End of the Year

In essence, the agreement was that strikers who desired to return to work would register (between August 9 and August 13); that registrants whose former jobs were available would be returned to those jobs; that registrants whose former jobs were unavailable would be returned to certain other jobs, if available; if jobs were not available by about Labor Day, they would be placed on a preferred hiring list and recalled to jobs which "developed" (e.g., by departure of incumbents), before December 31, 1960, the expiration date (7a-8a).

---

[2] During the first few days of the strike, violence and mass picketing occurred, for which the Connecticut courts awarded damages against the Union (4a, n. 1). However, except for 50 strikers whom the Company refused to reinstate because of their alleged participation in illegal acts (99a-100a), the reinstatement rights of the strikers were unaffected thereby (66a, n. 61).

[3] Hereinafter the Settlement Agreements will be referred to in the singular.

B. The Company Represents That the Complements Will Be Restored to Pre-Strike Size by Around Labor Day.

Early in July, the Company had embarked upon a program of hiring replacements for strikers (15a; 114a-116a). Throughout the settlement negotiations, the principal concern of the Union was the number of strikers who, in consequence, would not be reinstated (*id.*). The Company did not disclose how many replacements it had hired (J.A. 1163), but at the final meeting, on August 5, 1960, in response to the inquiry of International Union President Hayes, United Aircraft's Vice President for Industrial Relations, Burke, estimated that at Pratt & Whitney 600 strikers desiring reinstatement would not be " 'immediately' reinstated i.e., by approximately the first week of September)" (15a, n.5; J.A. 1163), and the following day he estimated that at Hamilton Standard the number would be "between 400 and 500" (15a).[4] The court below found that "[t]hese estimates were admittedly based on the assumption that the plants would again operate at pre-strike complements" (15a-16a); that "strike related production problems" ("parts shortage bottlenecks" (18a)), would not take more than "a few weeks" to solve and would "prevent reinstatement of some strikers" only "temporarily" (15a-16a; 54a-55a; see also, J.A. 2341), until around Labor Day (15a, n.5).[5] Burke

---

[4] Burke testified that he responded in the form of an estimate because "I made the assumption that I didn't know how many people we hired." (J.A. 1163).

[5] Burke did not characterize as a "guess," or in any way qualify or condition his assumption that the complements would be restored to normal size by Labor Day. Burke told Hayes that the "total complement" at Pratt & Whitney "before the strike" was 16,000, that there were 13,000 now working, and that accordingly, "it looked as if there would be 3,000 jobs available

promised that the Company would restore full production "as quickly as possible" (16a, 17a; J.A. 1169-1170).

The court below further found that the Company had "no plans permanently to abolish jobs" (17a); that "the prospect of the complement remaining below pre-strike levels for the duration of the Agreement was never seriously discussed during negotiations"[6] (54a-55a); and that "there is no question that the Union was under the impression that the principal reason that strikers would not be reinstated immediately was that they had been permanently replaced"[7]

---

there on that basis." (J.A. 1163). The conditions relevant to complement restoration were within the Company's, but not the Union's, knowledge, and staffing was a matter completely within the Company's control.

Defeat of the Union's expectations (5a, 10a-11a) about the number of strikers who would not be recalled resulted not from any inaccuracy in Burke's "guesses" (15a. n.5, J.A. 1443, 296, 1116), about volume of registration or turnover (which proved amazingly accurate), but from prolonged complement depression after Labor Day, which, as the court below found (54a-55a), Burke gave the Union no reason to anticipate.

[6] The exception implied by the word "seriously" refers to the early prediction, never repeated and not implemented, that 65 jobs would be abolished at Broad Brook (17a, n. 10). Burke's assistant, Personnel Manager Mooney, testified:

> "There were no estimates given them of fewer jobs at Windsor Locks, at Hamilton Standard or at East Hartford, for a rather obvious reason, I guess." (J.A. 328).

[7] There is nothing in the record or the findings of the district court (90a-93a) or the court below, to the effect that the Company suggested any reason other than replacement which might prevent reinstatement of strikers *after Labor Day*, and the findings of the Court of Appeals quoted above preclude interpreting the word "principal" in this sentence as implying that the Union was under the impression that strike related production problems might prevent reinstatement after Labor Day.

(54a, 90a-91a, 115a, 116a; J.A. 1131-1132, 1149-1151, 1163-1165, 1752).

Burke predicted that jobs would become available as a result of turnover "by the end of October" (see 241a), for the 500 or 600 replaced Pratt & Whitney strikers for whom jobs would not be available "immediately." [8] Burke assured Hayes that even if a striker's pre-strike job did not open up, "if there were other jobs which were open, and which *he was qualified to fill,* we would offer him that work" (J.A. 1162, emphasis added). Accordingly, the Union understandably did not balk at Burke's shortening of the duration of the preferred hiring list, so that it would expire on December 31, 1960, rather than six months after the end of the strike, as he had proposed earlier in the negotiations.[9]

On August 11, the day the Agreement was signed, Pratt & Whitney's President, L. C. Mallet, wrote all employees a letter assuring them that the Company would be able to maintain "current employment levels" (J.A. 2277).

C. The Company Fails to Recall Strikers Who Were Not Replaced or for Whom Vacancies Were Apparently Created by Termination

Pursuant to the terms of the Agreement, 6,556 strikers registered for reinstatement: 4,535 at Pratt & Whitney and 2,021 at Hamilton Standard. (9a). As the Unions ultimately learned through discovery,

---

[8] He told Hayes that monthly turnover was normally 1½ or 2 percent (J.A. 1165), which meant that between 240 and 320 vacancies would be created monthly.

[9] Burke's only "reason" for this change was that that "was as long as we wanted to continue the preferred hiring list" (J.A. 1161).

308 more employees terminated their employment at Pratt & Whitney from the beginning of the strike to the end of 1960 than were hired during the strike and at Hamilton Standard only 136 less employees terminated in that period than were hired during the strike (J.A. 2308-2312).[10] Thus, vacancies created by terminations would have made it possible to reinstate all registered strikers at Pratt & Whitney and all but 136 at Hamilton Standard (61a, 241a).[11]

In fact, however, at Pratt & Whitney 723, and at Hamilton Standard 839, registered strikers were not recalled during the life of the Agreement (10a). This resulted from the fact that the Company did not restore the work force in either division to its pre-strike level during the four-and-a-half months that the Settlement Agreement was in effect (61a-241a).

The court below found (13a):

> "It is an irrefutable fact that during the life of the recall Agreements the total work complement at all Company plants except Manchester (having a total pre-strike complement of only 133 employees) remained significantly below pre-strike levels."

It also found the following "pattern of employment during the period of the Agreement" (21a):

> "complements at both divisions rather than gradually growing peaked at about Labor Day and

---

[10] More than a third of the strikers who were recalled during the Settlement Agreement period were placed in inferior jobs (P. Exhs. 289, 289(a)).

[11] Pratt & Whitney hired only 2357 new employees during the strike, of whom 800 were summer employees, whom the Company arbitrarily mislabeled "permanent" replacements (116a, 163a-167a, see also, 241a, n. 47).

> thereafter continuously declined (at Hamilton Standard) or at least failed to regain that level before December 31, 1960 (at Pratt & Whitney). . . . "

Additionally, during the period of the Agreement the Company substituted overtime for population increase at Hamilton Standard, averaging 48.2% per capita of overtime more than in the five months preceding the strike (122a; J.A. 1950A, 1955-1958).

Complement depression adversely affected work opportunities *only for registered strikers;* no "active" employees were laid off (App. 628-629, 655-656, 907-908, 553-554). Restriction of adverse impact to registered strikers was accomplished as follows:

(a) "There were a significant number of non-strikers who nevertheless remained absent during the course of the strike (the absence having commenced either before or during the strike) because of illness, fear of violence, or other personal reason. All of these individuals desiring continued employment with the Company were immediately reinstated at the conclusion of the strike." (38a).

(b) During the period of the Settlement Agreement, the Company transferred, laterally or by promotion or demotion, junior non-strikers and recalled strikers into jobs to which registered strikers were awaiting recall (25a-38a, 150a-151a).

(c) During that period the Company appointed apprentices and trainees to jobs for which registered strikers were awaiting recall (28a, 37a, 167a-171a).

D. The "Hiring Surge" After January 1, 1961.

As soon as the Agreement expired, the employer terminated the "employee" status of the unrecalled

strikers (123a, 127a-129a), advertised in the newspapers for help (123a; J.A. 2279-2282, 2363) and quickly (within four months) restored the complements to normal size (13a, 25a) with outsiders and selected strikers hired as new empleyees out of seniority order (which the Company had been bound to observe during the life of the Agreement) (9a, 13a). The Company "made no attempt to ascertain how many of the registered strikers were qualified to fill these available jobs" (123a).

During what the court below characterized as "the hiring surge that occurred after January 1, 1961" (21a), Pratt and Whitney hired "over 1,700 employees" (25a), of whom only 278, less than 16%, were strikers (10a). In the first four months of 1961, Hamilton Standard hired 603 new employees (J.A. 2415-2416, 2445-2446), of whom only 177, or 29%, were strikers (10a, 13a). Almost all of the new hires were assigned to "occupational groups" (93a), or "codes" of registered strikers (J.A. 2262-2264).[12] It is undisputed that, as the dissenting Board members found in No. 75-1686, "there is no explanation for the hiring between January-April, 1961, of such a large number of new employees as compared to strikers with superior work experience" (243a).

E. The Belated Parts Shortage Explanation.

During the period of the Agreement the Company did not tell the Union that it had not restored the complements to normal size. Indeed, it twice reported the contrary during 1960. (See App. B, pp.44-45 in

---

[12] This is demonstrated in our Petition for Certiorari in No. 75-1686, App. A, p. 43.

Pet. No. 75-1686).[13] And it continued to deny complement depression until it was required to reveal the population figures during discovery, which it stoutly resisted. See the opinion of the district court, 53 LRRM 2904, August 1, 1963. It was not until July 29, 1964, when, pursuant to direction of the court, plaintiffs finally received the hourly paid population and overtime charts (J.A. 1950 A-1958), that appellants first obtained conclusive proof that the Company had been concealing the facts showing that the complements had been depressed and that it had been misleading both the court and the NLRB. Even then, the information which the Company supplied was not precise, for it included *all* hourly employees, including non-unit personnel (J.A. 265-266). Discovery had closed when, in February, 1967, appellee was forced by the court to disclose data limited to the bargaining unit population (J.A. 2297-2298, 2301-2302; 2412-2501A).

The court below declined to find in Burke's representations,[14] pp. 5-7, *supra,* an "implied obligation to restore full complements" on the ground that to do so

---

[13] In March, 1963, Company counsel proposed to the court that the tiny Manchester plant alone be used to test the depressed complement theory (J.A. 1231-1232). This proposal was rejected. As subsequently appeared, Manchester had 133 employees on June 7, 1960, and 136 employees on January 1, 1961 (J.A. 2501-2501A). Thus, unlike East Hartford (J.A. 2499-2500) and Hamilton Standard (J.A. 2415-2416, 2445-2446) the tiny Manchester complement was not depressed (13a). Thereafter and as late as February 10, 1967, in providing population data, the Company repeatedly combined Manchester with East Hartford, a tactic which obscured the unrepresentative character of the Manchester sample.

[14] The court below held that the terms "available" and "which developed" as used in the Settlement Agreement to describe jobs are to be construed and applied in light of Burke's representations and the parties' mutual understanding of the situation as it existed during the settlement negotiations (14a-17a).

would "require an employer to operate without the necessity of gearing employee levels to output requirements or efficiency" (16a). As did the district court, it adduced from *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), support for the view that the Company was privileged to "keep the complement below pre-strike levels" provided it acted in "good faith" and "only for legitimate and substantial business reasons unrelated to labor relations" (17a, 18a). The court did not consider that national labor policy as embodied in §§ 2(3), 7, 8(a)(1),(3)and 13 of the Act, and implemented in cases like *Fleetwood* itself, and *Labor Board* v. *Erie Resistor,* 373 U.S. 221, shows great solicitude for the rights to strike by guaranteeing reinstatement rights to economic strikers. Accordingly, the court did not take into account the impact of complement depression on strikers' reinstatement opportunities and consequent discouragement of future exercise of the right to strike.

The court below sustained the district court's theory that the Union has the initial burden of producing a *prima facie* case of "bad faith"; that, if it does, the burden of going forward with proof of "legitimate and substantial justification" then shifts to the Company (18a, cf. 61a, n.56) but that the ultimate burden of persuasion on that issue is on the Union. It sustained the district court's finding that here "the Union had made out a *prima facie* case of bad faith" but "the Company successfully rebutted this showing, satisfying the court" that "strike-caused production imbalances, consisting mainly of parts shortage bottlenecks,[15]

[15] The court below sometimes uses the terms "business considerations," "business exigencies" or "business conditions" as synonyms for "parts shortages" (20a).

were the *principal* reason for reduced employee complements" (18a, emphasis added).[16]

However, neither of the courts below made findings with respect to, or took account of, the Company's total failure to explain (or controvert) the propositions established by the Union's proof which wholly impeached the parts shortage defense. In order that this Statement will not be excessively lengthy, we shall state these propositions in summary form.

1. *Underpopulation of the Machine Shop.* The court below found that "the machine shop was the key to restoration of a full complement", because the machine shop produced the parts which had to be replenished before full production could be resumed (24a). Yet, "after an initial restaffing resulting in a peak population about Labor Day, the Machine Shop population was actually allowed to decline until December when more employees were again added" (*id*).[17] This was followed by a "marked increase * * * in the first three months of 1961" (*id.*).

The Company had admitted on brief that the 1961 increase was necessary "to meet as quickly as possible delivery schedules established well before the strike started" (Co. Br. to District Court, p. 64; to Trial Examiner, p. 138; to Board, p. 116); that at Pratt & Whitney "immediate recovery" in the machine shop

---

[16] The court did not explain why recovery was denied with respect to those jobs which were unavailable for reasons other than what it deemed the "principal" reason; for example, because of the Company's decision to postpone "every possible routine maintenance operation" until after the Settlement Agreement expired (120a).

[17] The monthly population statistics are set out in Appendix B, *infra*.

was the "key to a return to full production", and that job opportunities in all other sections of the manufacturing division depended upon recovery in the machine shop (Co. Br. to District Court, pp. 54-56). Yet it offered no explanation of *why,* if it was genuinely concerned with eliminating the parts shortage as soon as possible, it did not substantially increase the machine shop complement after the initial restaffing in 1960, *as it did immediately after the Agreement expired, in 1961* (24a).[18] Nor did the Company explain how parts shortages could have caused complement depression in the area which produces parts, thus depriving strikers of job opportunities *there.* App. B, *infra.*

2. *The Pattern of Employment Generally.* In Pratt & Whitney (East Hartford), Windsor Locks and Broad Brook there was a short spurt up to Labor Day followed by a net reduction during the rest of the settlement agreement period, followed by the hiring surge in 1961 (21a, 13a, App. C, *infra*). If parts shortages, rather than a desire to reap lasting benefits from the strike, explain the complement depression during the last months of 1960, one would have anticipated evidence that the sharp post-Agreement build-up was due to a sudden solution of the parts imbalance problem. But Company witnesses *admitted* that no sudden or drastic improvement in "parts shortages" or pro-

---

[18] Delivery volume reflected machine shop population. Between September and December, 1960, the machine shop complement accounted for delivery of an average of 175 engines per month; between March and June 1961, the sharply increased complement accounted for delivery of an average of 226 engines per month (App. G). This conformed with the projected delivery schedule respondent presented to the Navy on August 16, 1960, which forecast catch up beginning in February and peaking in March, 1961, pp. 16-17, *infra.*

duction difficulties preceded the restaffing in either division (J.A. 1023, 608-609, 697).

3. *Depression at Broad Brook.* Parts shortages cannot account for complement depression at Broad Brook, which was the most heavily unionized and the most severely depressed of the four plants, *since that plant did not manufacture its own, but assembled purchased* parts (J.A. 376-377, 661).

4. *Planned Reduction in Maintenance Operation.* Pratt & Whitney Personnel Manager Morse stated that he was "informed" prior to August 19, 1960, that "the maintenance organization would do a minimum amount of work *during the Strike Settlement Agreement*" (120a; J.A. 906-907, 863-864, 941, emphasis added), and that " 'every possible routine maintenance operation would be postponed' (Tr. 5593-5594, 6165-6168)." (120a). The decision to postpone maintenance operations, reducing job availability for maintenance division strikers, was obviously not caused by parts shortages or production bottlenecks.

5. *Planned Substitution of Overtime for Unrecalled Strikers.* The Hamilton Standard operating committee minutes of August 23, 1960, "reveal that '[p]roduction workers totalled 1,750 prior to the strike and the factory intends to hold employment to 1,600 on a 3-shift operation to avoid a 1961 layoff. This will require 20% overtime during 1960.' " (20a). Neither respondent nor the court below pointed to anything in the minutes (or the record) which purports to explain how this plan to substitute more expensive overtime for additional help for four and a half months could have been "dictated by strike related business disruptions and a parts inventory imbalance" (*id.*), nor did they attempt to ex-

plain how avoidance of a 1961 layoff—at the expense of denying strikers reinstatement in 1960—could conceivably constitute a "legitimate and substantial" business justification (17a).

6. *The Company's Foreknowledge of Complement Depression and its Consequences for Reinstatement.* The record contains no evidence that the Company altered, or had any basis for altering, its expectations of the extent and potential effect of parts shortages and inventory imbalance upon manpower needs for the balance of 1960 between August 5 and 6, when the Company predicted that these would not prevent full complement restoration beyond Labor Day (p. 5, *supra*), or August 11, when Mallet assumed that the Company would maintain full complements (p. 7, *supra*), and August 16, when the Company presented its stretched out delivery schedule to the Navy (see p. 17, n.19, *infra*), and September 19, when the Company privately, "in house," projected depressed complements until "the end of the year" (119a, 120a; J.A. 2349-2352).

Indeed, the Company's conduct demonstrates that on August 15, if not earlier, it was already engaged in a plan of deception. For on that day its Operating Committee Minutes projected that it would be able to deliver, even with the anticipated depressed complement, 93 engines in August and 154 in September, 1960 (J.A. 2348). The very next day, Pratt & Whitney officials presented a schedule of engine deliveries to the Navy and Air Force reflecting the "adjustments required as a result of the recent strike * * * " (*ibid.*), calling for delivery of only 78 engines in August and 142 in September—27 less than forecast just one

day earlier could be delivered in those months. J.A. 2327, 2348, 2610-2613, 983-984, 1025-1026).[19] The Company never explained why it thus misled its customer, the United States Government.

Further, the operating committee minutes show that the Company was well aware that its failure to restore full complements would leave approximately 1000 strikers in each Division unrecalled "by the end of the year" 120a; J.A. 2350 (Pratt & Whitney meeting of 9/19/60); J.A. 2356 (Hamilton Standard meeting of 8/23/60).

7. *The Company's Concealment and Misinterpretations.* The Company's concealment of complement depression and its insistence that job unavailability for the life of the Agreement was a result *only* of replacement (see pp. 10-11, *supra* and App. B of companion petition) confirms the Union's "*prima facie* case of bad faith" and is utterly irreconcilable with a contemporaneous view that denial of reinstatement was due to *any* reason which was not forbidden by statute or contract. The Company has never explained why it made these misrepresentations or sought to justify them.

---

[19] The Company's schedule provided for progressively increasing volume, reaching a peak in March, 1961, and getting "back on the schedule requested by the military * * * [by] the middle of 1961" (J.A. 2610). It did not call for respondent to begin to catch up with its strike-inflated backlog until April, 1961. This plan did "not meet the desired schedule of the Air Force and Navy through the next several months" (J.A. 2610). Respondent asserted that was the best it "could expect to do" (J.A. 990, 1020-21, 1025-1026), but it did not disclose that its expectations were based upon projection of a depressed complement "through the next several months" and non-population of the machine shop to full capacity to remedy parts deficiencies and bottlenecks until the beginning of 1961.

F. The Company Discriminatorily Prefers All Other Employees Over Senior Unrecalled Registered Strikers for Available Jobs.

The court below found (25a-26) that "[t]hroughout all three phases of the Strike Settlement Agreement, the Company's policy was to operate as if the unrecalled registered strikers had been laid off for lack of work." The effect of this policy was to afford every other employee, "inactive absentees,"[20] summer hires (162a-163a), trainees and apprentices (167a-171a), "strike replacements" (i.e., persons hired during the strike (47a-48a, 111a-119a), and all "active" employees (26a-27a, 149a-150a), a priority superseding seniority over all unrecalled registered strikers for jobs which were "available" when the strike ended and which "developed" thereafter until the Agreement expired (26a). The court below held that this discriminatory treatment of unrecalled registered strikers vis-a-vis all other employees was not contemplated or authorized by the Settlement Agreement (26a-31a, 32a, n. 31).[21]

---

[20] These were described as "a significant number of non-strikers who nevertheless remained absent during the course of the strike (the absence having commenced either before or during the strike) because of illness, fear of violence or other personal reason." (38a, 117a-119a).

[21] Thus, it reversed the district court's finding that it was the "basic intent" of the Agreement to treat registered strikers "as if laid off" (28a), rejecting the theory that incorporation by reference of certain provisions of the Settlement Agreement inferentially warranted application of the Company's past practice in layoff situations of making transfers, promotions and demotions without regard to the seniority of laid off employees (26a). The court observed that the Settlement Agreement did not incorporate by reference the sections of the collective bargaining

It held, nevertheless, that the Company was authorized to disregard the competitive status seniority of unrecalled registered strikers if the alternative was to lay off a junior "active" employee (or fail to return a junior "inactive absentee" (32a-33a)), or retain such junior employees at the price of increasing the size of the total complement beyond the maximum the Company "could productively employ" (*id.*). The court reasoned that dearth of productive work during the settlement agreement period was due to the strike and deemed it "unreasonable" to visit the consequences of post-strike job fluctuation "necessary to contend with the imbalances caused by the strike" (32a), upon non-strikers who had not contributed to that necessity (32a-33a). This reasoning was based not upon anything in the language of the Agreement but upon the court's interpretation of the rationale and implications of the right of replacement as defined in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 and attempted distinction of *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (33a and n. 35).[22]

Further, the court sustained the employer's preference of non-striker absentees over senior strikers for

---

contracts relied upon by the Company (28a-31a), and, further, that unlike layoff for lack of work situations, where junior employees were the ones on lay off, unrecalled registered strikers "ranged from among the most senior to the most junior" (29a). (See also, n. 31, 32a.)

[22] Applying its theory (34a, 38a), the court remanded to the district court to ascertain which, if any, of the transfers, promotions and demotions which "blocked" recall of a registered striker or resulted in recall to a lower labor grade job was made "to correct a production imbalance" and which for other reasons, inasmuch as only the latter constituted violations (26a,34a, 35a).

available jobs on the theory that strikers knowingly and voluntarily assumed the risk of losing their jobs by going on strike, whereas those who were absent for personal reasons did not (38a-40a). The court held that the statutory immunity of unreplaced strikers to discrimination with respect to seniority extends only to "benefits" and not to "competitive status seniority", which governs access to available job opportunities in the post-strike complement (39a-40a).

The court also upheld the Company's preference of graduate apprentices over senior unrecalled registered strikers (37a, 167a-171a), sustaining the District Court's theory (169a-170a) that the Company's individual "contractual" commitment to each apprentice overrides its statutory obligation to reinstate strikers to available jobs.

G. The Company Denies Registered Strikers Access to Many Available Jobs They Are Qualified To Fill.

During negotiations, Burke had assured the Union that strikers would be recalled to any jobs they were qualified to fill, p. 7, *supra*. Nevertheless, the court concluded that their rights were limited to jobs in the single "seniority area" and "occupational group" (at Pratt & Whitney) and the single "seniority area" and jobs in which the striker had "demonstrated ability" (at Hamilton Standard) (11a-12a, n. 4; 155a-162a, 171a), to which the striker had been assigned immediately before the strike. The court held that "an extension of the plain language by implication would be unwarranted," although it did not set forth language which in its view restricted the strikers' rights and the Agreement is entirely silent on the subject (n. 4, 11a-12a; but cf. n. 31, p. 32a). The court thus put aside

not only Burke's representations but also the Company's own contemporaneous construction, which was inconsistent with the court's reading, because it recognized the strikers' preference over outsiders (but not vis-a-vis "active" employees) when the preferred hiring list for a given seniority area and occupational group was exhausted (27a, par. 4, see also J.A. 1162, 1151, 1916, 958, 2564-2565). The court below held that its interpretation "can reasonably be said to accord with th[e] mandate" of *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 381, that strikers are entitled to reinstatement "when a job opens which they are 'qualified' to fill." Yet, this limitation drastically curtailed the number of available jobs for which registered strikers were actually qualified, to which they would be entitled to recall, for there are 116 administratively "non-interchangeable" but actually overlapping "occupational groups" (J.A. 2076, 1079, 2179) and 23 seniority areas (J.A. 2080, 2180) at Pratt & Whitney alone. Many strikers had worked in other occupational groups and seniority areas prior to their last pre-strike assignment, showing that these administrative classifications were wholly unrelated to qualification.

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES IMPORTANT QUESTIONS CONCERNING THE INTERPRETATION OF STRIKE SETTLEMENT AGREEMENTS IN LIGHT OF NATIONAL LABOR POLICY.

In § 301 of the Act Congress provided for judicial enforcement of collective agreements in order to "'promote a higher degree of responsibility upon the parties to such agreements, and * * * thereby promote industrial peace'" (S. Rep. No. 105, 80th Cong. 1st Sess. p. 17, quoted in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 454 (1957)). This "philosophy of § 301"

(*id.*) is fully applicable to strike settlement agreements, for "[i]f this kind of strike settlement were not enforceable under § 301(a), responsible and stable labor relations would suffer, and the attainment of the labor policy objective of minimizing disruption of interstate commerce would be made more difficult" (*Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17, 27 1962)). Yet, whereas this Court has frequently addressed itself to the duties to arbitrate and to refrain from strikes during the term of a collective agreement, reading contracts broadly in light of national labor policy to prevent *potential* industrial strife,[23] it has not yet made clear to the lower courts that the same method should govern the interpretation of strike settlement agreements which *terminate* lawful strikes. That the lesson is one which should be taught, and taught now, appears all too clearly from the decision below. For although "accepted principles of traditional contract law" (*Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, 105 (1962)) and the principle of *pacta sunt servanda* embodied in § 301 coalesce in favor of enforcement of the Company's representation that the complements would be restored, the Court of Appeals read into that representation an unstated condition utterly destructive of the interests of the promisees—the Union and the strikers. Moreover, the court failed to interpret the representation in light of the "constant" of "national labor policy": Congress' "concern for the integrity of the strike weapon" (*Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 234 (1963)) and particularly for the reinstatement rights of strikers

---

[23] See *e.g.*, the *Steelworkers* Trilogy, 363 U.S. 564 (1960); 363 U.S. 574 (1960); 363 U.S. 593 (1960); *Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); and *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368 (1974).

(*id.* at 233-235; *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967)). Instead, the Court imported from *Fleetwood* the concept of "legitimate and substantial business justifications" as a defense for refusing to reinstate employees who have engaged in an economic strike (*id.* at 379), ignoring the statutory context of that defense, and the limitations on its use declared in *Fleetwood*. The result is to deny enforcement of voluntary, contractual commitments which are not inconsistent with substantive labor law and defeat Congress' policy of allowing "disputed transactions [to] implicate both contractual and statutory rights" *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 50 (1974). See also *Smith* v. *Evening News Ass'n.*, 371 U.S. 195, 197 (1962); *NLRB* v. *Strong*, 393 U.S. 357, 360 (1969).

A. The court below acknowledged Burke's representations, p. 5, *supra*, that "strike-related production problems" (16a), *i.e.*, "parts shortage bottlenecks" (18a), would delay complement restoration to pre-strike size only "temporarily" (17a), and that "the plants would again operate at pre-strike complements" (16a) during all but the first "few weeks" of the Agreement (*id*; see also, 54a-55a). The court apparently also recognized that these "words" of the promisor (*Perry* v. *Sinderman*, 408 U.S. 503, 601-602 (1972)), infuse the contractual terms "available jobs" and jobs which "develop" (14a-15a, 17a).[24] But the

---

[24] The mutual expectation that jobs would be available after Labor Day in complements of pre-strike size was thus "a part of the agreement although not expressed in it." *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960). See also *Lucas Flour Co., supra*, 369 U.S. at 105.

"[T]he intention of the parties and the contractual implication become synonymous. • • • That which is manifestly contemplated in fact is implied and enforced in law." *Ryder Truck Rental Inc.* v. *Central Packing Company*, 341 F.2d 321, 324 (10 Cir. 1965), cert. denied, 382 U.S. 827.

court refused to hold Burke's representations a "commitment" (14a), on the ground that respondent "could not foresee the extent and duration of the reduced complements"[25] and it "would be extraordinary * * * [to] require an employer to operate without regard to the necessity of gearing employee levels to output requirements" (16a).

On the court's own findings, its rationale is self-defeating as a matter of contract law. It found that Burke actually referred to "the production problem" as affecting complement restoration (16a). Since Burke was aware of the problem, if he "could not foresee the extent and duration of the reduced complements," he should so have advised the Union, instead of leading it to believe that parts shortage bottlenecks would delay complement restoration only "temporarily"(16a-17a) and by no possibility for the entire duration of the Agreements (54a-55a). By those representations, the Company assumed the risk of unanticipated prolongation of parts shortage bottlenecks: the occurrence, therefore, "does not excuse performance." Smit, *Frustration of Contract*, 58 Col. L. Rev. 287, 314 (1958).

Even "where the promisor, though having no power to prevent the contingency, had superior knowledge of the possibility of its happening," under the law of

---

[25] Although the opinion attributes unforeseeability to "the parties," only foreseeability by the Company is relevant since only the Company knew about parts shortage bottlenecks and only it had the technical expertise to project their impact upon complement restoration and resumption of full production. That was a matter about which the Union "knew nothing," whereas the Company "knew all about it." *Berg* v. *Erickson*, 234 Fed. 817, 824 (8 Cir., 1916). Therefore, the Union was compelled to, and did, rely upon the Company's representations.

contracts, he "took the risk," 6 Williston, *Contracts,* Rev. Ed. 1938 § 1953, p. 5476, unless he expressly excluded it in the agreement. It is manifestly unfair to impose the risk on the uninformed, or less aware, party, for one cannot be expected expressly to guard against assumption of a risk of which he is unaware or the probability of which he cannot measure. On the other hand, it is fair to impose that burden on a party with superior knowledge which he did not disclose, for he could have avoided the risk simply by full disclosure, thereby opening allocation of the risk to conscious bargaining.[26] To exculpate such a party is to reward non-disclosure and frustrate both the bargaining process (*NLRB* v. *Acme Industrial Co.,* 385 U.S. 432, 435-436 (1967), and enforcement of promises which the promisee reasonably perceives to be non-contingent.

Here, the Company was aware of the importance to the Union of prompt complement restoration; that was the *sine qua non* of fulfillment of the Company's promise that all strikers who had not been permanently replaced, and others for whom terminations would create vacancies, would be returned to work during

---

[26] As the Fifth Circuit explained very recently:

> "* * * because the purpose of a contract is to place the reasonable risk of performance on the promisor, he is presumed, in the absence of evidence to the contrary, to have agreed to bear any loss occasioned by an event which was foreseeable at the time of contracting. *Lloyd* v. *Murphy,* 1944, 25 Cal.2d 48, 54, 153 P.2d 47, 50 (Traynor, J.); *see Madeirense Do Brasil S.A.* v. *Stulman-Emrick Lumber Co.,* 2 Cir., 1945, 147 F.2d 399, 403; * * * Underlying this presumption is the view that a promisor can protect himself against foreseeable events by means of an express provision in the agreement."

Eastern Air Lines, Inc. v. *McDonnell Douglas Corp.,* slip. op. 3448, 3488-3489 (5 Cir. May 17, 1976).

the Agreement (15a-16a, 54a). For the reasons stated by the court (17a, 54a-55a), the Union would naturally accept the Company's appraisal and could not have been expected to seek more explicit assurances. If the Company desired to avoid the risk that "strike dislocations and production difficulties" might unexpectedly delay complement restoration for the duration of the Agreement, thereby depriving the Union of its fruits of the bargain, it was bound by the reasonable expectation principle, as well as by the obligation of good faith and fair dealing, at least to disclose that risk to the Union. Thus, "the fact that the Agreements were made under the assumption" that "strike-related production problems would "prevent reinstatement of some strikers * * * *temporarily*" (16a-17a) (emphasis added), forecloses contention that the Company eschewed the risk that *those problems* might prevent reinstatement of some strikers *permanently*.

The fact that "strike related production problems [and consequent 'duration of * * * reduced complements'] were expressly within the contemplation of the parties * * *" (16a), does not render "extraordinary" (*id.*) a construction holding the employer to have assumed the risk of prolonged complement depression beyond the mutually contemplated date, but rather compels it. To immunize the employer against that risk for a policy reason—to authorize his pursuit of "legitimate and substantial business [considerations] unrelated to labor relations" (17a)—is to defeat the policy of Section 301 itself—"to promote a higher degree of responsibility upon the parties to [collective] agreements * * * " (see p. 21, *supra*).

Even if the findings do not compel imposing the risk of legitimately prolonged complement depression on

the Company, they most assuredly foreclose casting the burden of loss entirely upon the Union. The decision below, by doing just that, defeats the Union's legitimate expectation, forfeits the Union's consideration, and bestows an unanticipated windfall upon the Company.

The findings establish that the assumption of complement restoration within a few weeks was the key to Union acceptance of the Company's strike settlement terms.[27] In reliance on these assumptions the Union performed the acts which were its consideration for the Company's executory obligations: it called off the strike and had the strikers register. When complement restoration was unexpectedly prolonged, it was impossible to restore the Union to the position it had when the Agreements were made. When the expiration date arrived with the complements still depressed (9a, 46a), the Company acquired a privilege the parties had assumed it would not have—to repopulate to normal size without reference to the preferred hiring list. By using this unbargained-for privilege to restaff with strangers and selected strikers hired out of seniority order as new employees, at lower wage rates, the Company unjustly profited not only directly through the wage differential, but, far more over the long term, by discouraging future exercise of the right to strike.

The law does not permit losses resulting from *unforeseen* contingencies to be thrust entirely upon an inno-

---

[27] The Union's principal concern was "the number of strikers who would not be reinstated" (15a), and Burke's reassuring estimates, however "iffy," of the number who would not be returned "by approximately the first week of September" (*ibid.*, n. 5), were "admittedly based on the assumption that [by then] the plants would again operate at pre-strike complements" (15a-16a).

cent promisee. "When unforeseen contingencies occur, not provided for in the contract, the courts require performance as men who deal fairly and in good faith with each other would perform without a law suit. It is thus that *unanticipated risks are fairly distributed and a party is prevented from making unreasonable gains at the expense of the other.*" 3 Corbin, *Contracts,* § 541, p. 97 (1960 ed.) (emphasis added). "[*N*]*either can be allowed to profit by the situation.*" *Restatement of Contracts,* § 468, Comment on Subsection (3), p. 887 (emphasis added).

Even when forfeiture of consideration is not involved, temporary, as distinguished from permanent, impossibility *pro tanto* suspends and *extends* rather than extinguishes obligations. 6 Corbin, *Contracts,* § 1327, p. 342; § 1333, p. 372; 6 Williston, *Contracts,* § 1957, p. 5489, *Restatement of Contracts,* § 462. Extinction entails restitution. *Restatement, supra,* § 468, pp. 884-995; Corbin, *supra,* § 1320, p. 322; § 1322, p. 325. Where, as here, restitution is impossible, temporary extension is imperative to avoid both unjust enrichment of the promisor and forfeiture by the promisee.

On the hypothesis that the Company did not assume the risk of prolonged complement depression, the dissenting Board members correctly applied the governing principle of contract law to this case:

> "As we see the agreement, the Respondent's inability to recall all of the strikers by December 31 due to its unforeseen economic problems amounted to a mere temporary impossibility to comply therewith, but did not suspend its duty to recall all remaining strikers until it reached the prestrike complement." (241a-242a), citing, *id.* at n.49, § 462, *Restatement of Contracts*).

B. Instead of measuring respondent's contractual duty under the risk allocation principle of the law of contracts, the courts below (17a, 148a-149a) imported from *Fleetwood* the concept of a "legitimate and substantial business justification," and exonerated the Company on finding that "parts shortage bottlenecks" constituted such a justification. The importation subverts national labor policy by transforming a defense against a statutory violation into a limitation upon contractual obligation. This Court explained in *Fleetwood:*

> "If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act. Under §§ 8(a)(1) and (3) it is an unfair labor practice to interfere with the exercise of these rights. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice. NLRB v. Great Dane Trailers, 388 U.S. 26, 34." (*Id.* at 378).

Recognition of such justification as a defense to a charge of a violation of statutory rights[28] does not

---

[28] Even a legitimate and substantial business justification is not automatically a defense to an unfair labor practice; its validity depends on weighing the respective interests of the employer and the employees in light of the national labor policy. See *Fleetwood*, 389 U.S. at 378; *Great Dane*, 388 U.S. at 34; and *Erie Resistor*, 373 U.S. at 228-230. The courts below did not balance these interests, as they should have, *if* the defense was relevant.

The courts ignored another limitation on the *Fleetwood* defense —that the "substantial and *bona fide* reasons" must be "other than considerations relating to labor relations" (*Fleetwood*, 389 U.S. at 379). The court below absolved the Company of the job diminution consequences of the excess overtime at Hamilton Standard,

reflect a positive national labor policy that strikers should not be reinstated if parts shortages or other non-labor related business reasons make it less than economical to reinstate them. Yet only such a positive national policy could justify refusal to hold an employer to the consequences of his unconditional representation that complement depression would be only temporary. The Act does not disfavor, much less forbid, inducements to settle strikes which grant greater reinstatement rights than strikers are entitled to under the Act.[29] It follows that nothing in *Fleetwood,* properly understood, justifies frustration in this case of the "strong policy favoring judicial enforcement of collective bargaining contracts" (*Hines* v. *Anchor Motor Freight, Inc.,* 96 S.Ct. 1048, 1055 (March 3, 1976), quoting the passage from the Sen. Rep., set forth at p. 21, *supra*).

The court's approach inverts the scheme of the Act as a whole which provides separate remedies to enforce rights created by contract and rights created by statute. By virtue of Congress' decision to leave the enforcement of contracts "to the usual processes of the law and not to the National Labor Relations

---

although the Company admitted below (Co. Br. 69, n.88), that its purpose was to avoid a 1961 lay off. which is, of course, a consideration related to labor relations. (Indeed, although it is unnecessary for the present point, it is an impermissible preference of active employees over strikers awaiting recall, see pp. 35-42, *infra.*)

Yet another error in applying the defense—misallocation of the burden of proof—raises an issue of such general importance that it independently warrants certiorari; it is therefore stated as a separate Question, discussed pp. 32-35, *infra.*

[29] This is in contrast with illegal terms, that is, those which violate statutory rights, like an agreement to hire only union members, or to grant superseniority to non-strikers.

Board",[30] the Act creates "overlapping, concurrent regimes, neither pre-empting the other" (*NLRB* v. *Strong*, 393 U.S. 357, 360 (1969)). As explained in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 50-51 (1974), "the relationship between the [Board and district court] is complementary since consideration of the claim by both forums may promote the policies underlying each." The decision below, however, promotes neither statutory nor contractual rights and defeats the latter.

C. The national labor policy which governs this case is not the "legitimate and substantial business justification" defense, but the affirmative protection Congress accorded to the strike weapon by guaranteeing strikers reinstatement rights.

As *Erie Resistor* held (373 U.S. at 233-234), and *Fleetwood* reaffirmed (389 U.S. at 378), that guarantee is at the core of national policy because "[i]f, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act, * * * ." (*Id.*)

Nevertheless, the courts below took no account "of the deference paid the strike weapon by the federal labor laws and the devastating consequences upon it" (373 U.S. at 235) of acceptance of the parts shortage defense, even on the courts' view of the facts. The problem, though particularly acute here, is one affecting strike settlement agreements generally: Shall unconditional representations be construed and enforced to protect strikers' reinstatement opportunities or lim-

---

[30] H.R. Cong. Rep. No. 510, 80th Cong., 1st Sess., p. 42, quoted in *Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962).

ited by implication to foreseen conditions?[31] Stated otherwise, shall the risk of contingencies not expressed in the strike settlement agreement be placed upon the Union and the strikers? Interpretation to minimize the risk that a striker will lose his job by striking is indispensable to effectuation of Congress' "repeated solicitude for the right to strike" (*Erie,* 373 U.S. at 233-234) and is therefore required by *Lincoln Mills.*[32]

II. THE LOWER COURT'S ALLOCATION OF THE BURDEN OF PROOF IS CONTRARY TO THE HOLDING OF FLEETWOOD AND THE REQUIREMENTS OF NATIONAL LABOR POLICY.

We have urged in point I hereof that the Court of Appeals' interpretation of the agreement as exonerating the defendant on the depressed complement issue was wrong as a matter of law, and raises serious and important issues under § 301 of the Act. That discussion assumed the correctness of the Court of Appeals' affirmance (albeit on reasoning which differed in material respects), of the district court's conclusion that the Company did not act in bad faith. That conclusion however, is itself fatally infected because it was reached by placing on the Union an insuperable, and in any event impermissible, burden of proof. The lower courts misinterpreted *Fleetwood,* holding that that case

---

[31] Compare the arbitration cases beginning with the *Steelworkers* Trilogy which, in light of § 203(d) and the Act as a whole, have construed arbitration provisions broadly, and denied arbitration only over issues expressly excluded therefrom.

[32] The point is particularly well made in *NLRB* v. *Industrial Cotton Mills,* 208 F.2d 87, 91 (4 Cir. 1953,) *cert. denied,* 347 U.S. 935 (1954):

> "The right to reinstatement granted to a blameless unreplaced striker is designed to set the limit of the risk he runs by striking. That limit, which should not be unduly extended, is fixed at replacement by the employer or misconduct by the employee."

only required "the Company to come forward with what evidence of justification that it might have" but "did not, as we read it, decide what party ultimately bore the risk of nonpersuasion in the event that after all the evidence is in the scale remains evenly balanced" (61a, n. 56, see p. 12, *supra*). This reading of *Fleetwood* was also the basis of the Court's affirmance of the Labor Board on the depressed complement issue in the companion case, and is challenged by our Petition in that case, p. 3. We respectfully refer the Court to our discussion of this issue, *id.* at pp. 33-35. We add only that our understanding of the meaning of the phrase "burden of proof" as distinguished from "the burden of going forward", is the same as this Court's use of these terms in *Lavine* v. *Milne,* 96 S.Ct. 1010, 1015 (March 3, 1976).[33]

---

[33] The district court read *Fleetwood* correctly, but held that the rule stated therein was not applicable to suits under § 301 (148a-149a). In this the court erred:

1. The burden of proof rule declared in *Fleetwood* is itself part of the national labor policy because it is a corollary of the principle that legitimate and substantial justification is a *defense* to an unfair labor practice charge, see 389 U.S. 379, n.4. Thus, if defendant's contractual obligation can be limited by that defense, as the courts below held, *Fleetwood's* burden of proof rule must govern. Compare the decisions holding that state law applies to the allocation of the burden of proof in diversity cases, *e.g., Dick* v. *New York Life Ins. Co.,* 359 U.S. 437, 446-447 (1959); *Palmer* v. *Hoffman,* 318 U.S. 109, 117 (1943).

2. The same rule would be applicable on principle, even absent the express holding of *Fleetwood,* and quite aside from the fact that normally--and here concededly—alleged business reasons for nonreinstatement are a matter of defense. For, such business reasons are facts peculiarly within the employer's possession, so that basic considerations of fairness compel that he bear the burden of *proof.* Compare, *United States* v. *New York, N. H. & H. R. Co.,* 355 U.S. 253, 256, n. 5 (1957); *Railway Clerks* v. *Allen,* 373 U.S. 113, 122 (1963); *South Carolina* v. *Katzenbach,* 383 U.S. 301, 332 (1966).

Because the courts below misallocated the burden of proof on the critical factual controversy in the case, the judgment below cannot stand. As stated in *Lavine* v. *Milne, supra,* 96 S.Ct. at 1015: "Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application." See also Pet. No. 75-1686, p. 35.

But this record presents the further question whether the courts below did not merely impose on the Union a burden of proof inconsistent with the precedent most directly in point, but actually imposed a burden so onerous as to virtually prevent enforcement of agreements under § 301. For while the courts professed to place on the Company the burden of coming forward with "what evidence of justification that it might have" (61a-62a, n.56), in fact it did not fault the Company for failure to present evidence essential to its claimed justification, as the Statement, *supra,* details.

This error was compounded by the Court of Appeals' failure even to notice, much less draw an adverse inference from, the company's course of misrepresentation and concealment, pp. 10-11, *supra;* the company's non-explanation of that course when complement depression was finally exposed (*id.*); its invention of innocent explanations, for example, of a damning inculpatory statement in the operating committee minutes which the Company never attempted to explain even though participating officials testified at trial (20a); its approval of the district court's omission to make any finding as to the reason for the hiring surge at East Hartford at precisely the moment the settle-

ment expired (25a); and its refusal to examine the totality of the Company's conduct in assessing its motive. See *Continental Co.* v. *Union Carbide,* 370 U.S. 690, 698-699 (1962). Such treatment of promisees' defeated expectations utterly destroys the purpose of Section 301.

III. DENIAL TO UNRECALLED STRIKERS OF OPPORTUNITY TO COMPETE FOR OPEN JOBS ON THE BASIS OF SENIORITY LICENSES DISCRIMINATION.

The holdings that an employer may override strikers' "'competitive status' seniority" (*Franks* v. *Bowman Transportation Company,* 96 S.Ct. 1251, 1261, March 24, 1976), in filling jobs after a strike drastically curtails the Act's prohibition of discrimination as heretofore understood and raises profound questions of interpretation of this Court's decisions which "set the limit of the risk [a blameless unreplaced striker] runs by striking." *Industrial Cotton Mills,* n. 32, p. 32, *supra.* Because of the intrinsic importance of reinstatement rights in the statutory scheme and because temporary depressed complements "[f]requently" (*NLRB* v. *Fleetwood Trailer Co.,* 389 U.S. 375, 381 (1967)), follow a strike, the issues should be resolved by this Court at the earliest opportunity.

A. Until this case, it had been considered firmly settled that less favorable treatment of strikers than of non-striker absentees with respect to either "benefit seniority" or any incidents of "competitive status seniority", (*Franks* case, *supra*), including entitlement to post-strike employment opportunities, is forbidden discrimination. *General Electric Co.,* 80 NLRB 510, 512-513 (1948); *Quality Castings Co.* v. *NLRB,* 325 F.2d 36, 40-41 (6th Cir. 1963), see also, *Quality Cast-*

ings Co., 139 NLRB 928, 930-931 (1962); *Great Lakes Carbon Co.* v. *NLRB,* 360 F.2d 19 (4 Cir., 1966); *NLRB* v. *Frick Company,* 397 F.2d 956, 961, 962-963 (3 Cir., 1968). Assertion that the Act's protection of strikers' seniority extends to "benefits" but not to open jobs (39a-40a), is not only unprecedented but entirely wrong.[34]

It has long been understood that strikers whose "employee" status at the end of the strike is intact must be "treated *in all matters involving seniority and continuity of employment* as though they had not been absent from work." *Olin Mathieson Chem. Corp.* v. *NLRB,* 232 F.2d 158, 160 (4th Cir., 1956), aff'd. per curiam, 352 U.S. 1020 (1957). In *Great Lakes Carbon Co., supra,* the Fourth Circuit, following *Erie Resistor,* held that strikers are protected against superseniority affecting "not only future layoffs * * * but also * * * *open jobs*" (emphasis added). See also *General Electric Co., supra.* The prohibition against discrimination cannot be circumvented by treating the non-striker absentee, but not the striker, as having during his absence "occupied" a job, which is therefore not "available" for allocation in accordance with seniority after the strike, because, under *Olin,* strikers must be treated "as though they had not been absent." Indeed, to treat non-striker absentees, but not strikers, as if they had not been absent is itself discrimination forbidden by *Olin* and *General Electric, supra.*

---

[34] It also appears to be inconsistent with the court's recognition that the Agreement did not authorize respondent to bypass unrecalled strikers' competitive status seniority by treating them as if they had been laid off (28a-32a).

The court below sought to justify preference for non-striker absentees over unreplaced[35] strikers on the theory that it would be "unjust" to impose on them the same risk of job unavailability because of replacement or "other legitimate and substantial business justification" which strikers voluntarily assume (38a-40a). But this overlooks that any risk the strikers assume ends "at the strike's conclusion" (40a); it cannot lawfully be extended beyond the end of the strike. To award an unoccupied job to a junior non-striker absentee instead of to a senior striker is, in effect, to replace the striker *after* the strike.

Moreover, the court's perception of "injustice" defeats Congress' policy of according statutory protection to strike absence. "*Lincoln Mills* did not envision any free-wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of Congressional pronouncements." *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 255 (1974). The court below concedes that "absence from work because of personal reasons unrelated to the strike or fear of violence is not protected activity * * *." (39a). But it fails to draw the necessary conclusion. Because his absence is

---

[35] Although the court below found that "[s]ome of these strikers who remained unreinstated on December 31, 1960, had undoubtedly had their jobs filled by replacements before the end of the strike" (48a), it also accepted the Company's contention that no strikers "whose jobs were occupied by new hires" could be identified (47a). It follows that no identifiable registered strikers lost their "employee" status by reason of "permanent replacement" under the Board's pre-*Laidlaw* (The *Laidlaw Corporation*, 171 NLRB 1366 (1968), enforced 414 F.2d 99 (7 Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), interpretation of *Mackay*, 304 U.S. 333 (1938)). The court in effect so held in declaring registered strikers entitled to compete on the basis of seniority for job openings not attributable to production adjustments occasioned by bottlenecks (34a).

unprotected, the non-striker absentee runs an *unlimited* risk of job unavailability; as a matter of law, the risk he runs is *greater,* not *less,* than that assumed by a striker. To shield non-striker absentees from even the limited risk to which strikers are legally vulnerable is to reject Congress' conception of "justice" and to subvert its policy.[36]

B. Essentially the same misperception of "injustice" underlies the sanctioned preference of "active" employees over senior unrecalled strikers for transfer and promotion to jobs which become available through combatting parts shortage bottlenecks after a strike (32a-34a). The proferred rationale—that non-strikers should not have to suffer "the consequences of the production imbalance caused by the strike" (33a)—would legalize lay-off of recalled senior strikers in favor of junior non-strikers, in the teeth of *Erie Resistor.* Post-strike discrimination in allocation of available jobs is not legitimized by blaming the strikers for unavailability of other jobs, from which layoffs must be made; that is indistinguishable from licensing discrimination against striking itself. To limit the license to consequences of striking is but to "make the punishment fit the crime." The limitation simply emphasizes the transformation of striking from protected activity to conduct vulnerable to ostensibly "reasonable" discrimination, the very transformation attempted by the Ninth Circuit in *NLRB* v. *Potlatch Forests,* 189 F.2d 82, 86 (9th Cir. 1951), which was discredited in *Olin*

---

[36] Thus, to treat non strikers' absence during the strike as a "fortuity" (39a) because absence at another time would not have entailed a risk of job loss discriminatorily insulates non-striker absentees against the effects of post-strike temporary complement depression.

and "eliminated" (*NLRB* v. *Transport Company of Texas,* 438 F.2d 258, 266 (5th Cir. 1971), by this Court in *Erie,* 373 U.S. at 222, 225.

The court's reasoning from *Mackay Radio* (33a, n. 35 and accompanying text), is fallacious. First, as *Erie Resistor* teaches, the right of replacement itself exists only as a defensive countermeasure during the strike, and the immunity of replacements to displacement is no larger than necessary to enable the employer to exercise that right. *International Ass'n. of M. & A. W. Dist. No. 8* v. *J. L. Clark Co.,* 471 F.2d 694, 696 (7 Cir, 1972) It cannot be extended to shield "replacements," graduating apprentices[37] (or "active" non-strikers and recalled strikers for that matter)[38] against layoff by awarding them a preference superseding seniority over senior strikers in competition for "open" jobs after the strike. *Great Lakes Carbon* case, *supra*; cf. *Clark* case, *supra.*

Any such preference, like superseniority, is "inherently discriminatory [and] destructive" of the right to strike *Erie Resistor,* 373 U.S. at 228, 231, 235, 237. Such "preferential [treatment of] those who worked as opposed to those who struck" (*ibid,* at 231), is un-

---

[37] The rationale for approval of preference for graduating apprentices over senior strikers is the employer's assumed common law obligation to apprentices. (38a; J.A. 1504-1506). That rationale is in conflict with *J. I. Case* v. *NLRB,* 321 U.S. 332, 337 (1944), holding that individual contracts are superseded by the employer's statutory obligations.

[38] Since the victims of respondent's preference of "active" employees were exclusively unrecalled registered strikers, the preference was clearly discriminatory and strike-discouraging even though its beneficiaries included recalled strikers. Cf. *Allied Industrial Wkrs., AFL-CIO, Local Union No. 289* v. *NLRB,* 476 F.2d 868, 877, n. 17 and accompanying text (D.C. Cir., 1973).

necessary to effectuate the employer's interest in offering job retention as a "means of attracting replacements;" it is *not* "necessarily an acceptable method of resisting the economic impact of a strike" (*ibid.*, at 232).

That the Company's preference policy in this case was adopted after the strike proves that it was not necessary and not designed to enable the employer to "attract" replacements during the strike—which is the predicate of *Mackay* immunity to displacement. *Olin* case, *supra*, 232 F.2d at 161-162. Thus, the court's observation (34a, n.35), that, unlike *Erie*, here the discriminatory "promotions and transfers had no effect on the strike itself," is self-defeating.

Second, as applied to "open" jobs, the basic premise of the court's reasoning—that *Mackay* authorizes the employer "in effect, [to] give * * * [permanent] replacements post-strike employment preference over strikers" (33a, n. 35)—is patently false. It is undisputed that if, after some strikers are returned to work, production adjustments made necessary by the strike require layoffs, the employer could not lawfully keep junior "active" employees at work in preference to such senior strikers. Thus, *Mackay* does *not* guarantee junior replacements against layoff at the expense of senior strikers when layoff is the consequence of production adjustments made necessary by the strike. To that extent, at least, "the consequences of production imbalance caused by the strike" *must be* "visited upon the [junior] active employees." (33a). There is no reason and no authority for treating a striker who is entitled under *Mackay* to reinstatement to available jobs as any more susceptible to discrimination than a

striker who has been recalled to work. See *Olin* and *Quality Castings, supra.*

Third, the characterization of competition for "open jobs" as requiring an employer "to lay off its active employees so as to make room for strikers" (33a) is a fundamental error. The "room," the open job, is not created by the layoff of an active employee. It is "open" by virtue of the employer's decision that help is needed in an unoccupied job. The employer is merely required by the prohibition against discrimination to use a neutral principle—seniority—in filling it. Nor is the junior "active employee" laid off "so as to make room for [a] striker[]." He is laid off because there is no work available in the job he held at the end of the strike. That is the job to which his protection against displacement is necessarily limited. See *Clark* case, *supra.*

Fourth, the court's narrow reading of *Erie* as predicating the finding of damage to the strike weapon on the "exceptionally great" job security extended to those who worked and to the continuing cleavage between those "in the plant" (33a, n. 35), is entirely unjustified. Neither the Board nor any other court after *Erie* has sustained *any* grant of superseniority, however short, or failed to recognize that such a preference is, *per se,* inherently discriminatory and tends to discourage future strike action. Moreover, inasmuch as the registered strikers admittedly retained "employee" status during the period in issue, and were held by the court entitled to compete against active employees on the basis of seniority for all job openings not resulting from a need to adjust to production imbalances (34a), the continuing discriminatory preference of active employees for other jobs

which opened up cannot be compared with nondisplacement of replacements at the end of the strike, "which ceases to be an issue once the strike is over." 373 U.S. at 231.

IV. DENIAL OF RECALL OPPORTUNITIES TO MANY JOBS STRIKERS ARE QUALIFIED TO FILL CONFLICTS WITH LONG-ESTABLISHED LAW APPROVED IN FLEETWOOD

The holding that restriction of strikers' job rights to the seniority area and occupational group (at Pratt & Whitney) or job (at Hamilton Standard) at which the striker had "demonstrated ability," is not "inconsistent * * * with *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967)" (12a, n. 4), raises an important question of interpretation of that decision. *Fleetwood* approved old law which entitled strikers to be reinstated to all open jobs "which they are 'qualified' to fill." "Qualified" is defined by the dictionary as "competent" or "fit." *Websters Third New International Dictionary* (1965), p. 1858. Since qualification "relates to justification," *Fleetwood* recognized that the burden of proving a striker's lack of "qualification" is on the employer. 389 U.S. at n. 4, p. 379; Pet. for Certiorari in 75-1686, pp. 33-35. The purpose, of course, is to expand the range of strikers' job opportunities.

The "seniority area," "occupational group" and "demonstrated ability" restrictions cannot be reconciled with *Fleetwood* on the theory that they are reasonable "criteria" of qualification. Admittedly, "seniority areas" exist solely for "administrative purposes"—to serve the Company's convenience—and have *nothing whatever to do with the competence of employees to perform work* (93a-94a). "The same [occupational] group might appear in 10 to 20 differ-

ent seniority areas" (*ibid*). Inasmuch as there were 23 separate seniority areas at Pratt & Whitney (*id.*), and 26 at Hamilton Standard (J.A. 2179), this restriction alone arbitrarily reduced by over 50 per cent the scope of strikers' job opportunities, despite "qualification."

Moreover, neither the "occupational group" limitation at Pratt & Whitney, nor the "demonstrated ability" limitation at Hamilton Standard, can "reasonably be said" to be "criteria" of qualification (12a, n. 4). Admittedly, occupational groups overlap skills (93a-94a; J.A. 2076-2079, 2179). Further, a worker may be qualified for (and may indeed have filled) jobs in many other occupational groups than the one he happened to occupy at the time of the strike. Similarly, the requirement that qualification be demonstrated by past performance on the job, which is the meaning of "demonstrated ability" (11a), is too significant a substantive and procedural limitation on *Fleetwood's* "qualification" standard to be said to be "reasonably in accord" with it.[39]

Whether restrictions may be imposed, either unilaterally by the employer or by agreement with a Union, upon the range of jobs available to qualified strikers is obviously an unanswered question of major importance in administration of the Act. Restrictions on job opportunities which are not incompatible with public policy in layoff and recall situations cannot be squared with Congress' policy of limiting the risk

---

[39] The Labor Board shares our understanding of the plain language of *Fleetwood: In Fire Alert Co.*, 207 NLRB 885, 886 (1973), the Board said: "Thus, it is obvious that the Respondent's reinstatement obligation here is not limited to the strikers' old positions, but rather includes reinstatement to substantially equivalent positions which the strikers are qualified to fill."

strikers run by assuring them access to all jobs they are qualified to fill and placing the burden of proving lack of qualification on the employer.

This major question should be authoritatively resolved at the earliest opportunity, and at this juncture in the instant case, for even if certiorari were to be denied on all other issues, the remanded transfer and promotion issues (34a-38a) turn upon it. If strikers' eligibility is not limited to jobs in their own particular seniority area and occupational group or "demonstrated ability," the "blocking" effect of illegal transfers and promotions is far in excess of that conceived by the court below. Inasmuch as the entire course of future proceedings turns on resolution of this issue, it should be decided by this Court now.

CONCLUSION

The court below eviscerated Section 301 in application to strike settlement agreements, sanctioned discrimination against strikers in filling open jobs and misconstrued and misapplied *Fleetwood* in a variety of ways. The guidance of this Court in the evolution and effectuation of national labor policy is plainly necessary. This petition should be granted.

Respectfully submitted,

PLATO E. PAPPS
Machinists Building
Washington, D. C. 20036

MOZART G. RATNER
1900 M Street, N. W.
Washington, D. C. 20036

Attorneys for Petitioners

Of Counsel:

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D. C. 20037